

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL S. JOSEPH and DEPARTMENT OF THE AIR FORCE,  
MACDILL AIR FORCE BASE, IL

*Docket No. 03-1344; Submitted on the Record;  
Issued October 14, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has more than a 38 percent permanent impairment of the lungs for which he received a schedule award.

On January 10, 2002 appellant, then a 79-year-old former general maintenance supervisor, filed an occupational disease claim alleging that he sustained asbestosis in the performance of duty. On June 28, 2002 the Office of Workers' Compensation Programs accepted appellant's claim for asbestosis.

On July 31, 2002 appellant filed a claim for a schedule award.

By decision dated August 23, 2002, the Office granted appellant a schedule award for 118.56 weeks of compensation based on a 38 percent permanent impairment of the lungs.

By decision dated February 24, 2003, an Office hearing representative affirmed the Office's August 23, 2002 decision.

The Board finds that appellant has no more than a 38 percent permanent impairment of the lungs for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404.

uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Under the A.M.A., *Guides*, permanent impairment of the lungs is determined on the basis of pulmonary function tests, the forced vital capacity (FVC) and the forced expiratory volume in one second (FEV<sub>1</sub>), the ratio between FEV<sub>1</sub> and FVC and diffusion of carbon monoxide in the blood (Dco). Table 5-12 of Chapter 5 of the A.M.A., *Guides* describes the four classes of respiratory impairment.<sup>3</sup> If the FVC, FEV<sub>1</sub>, FEV<sub>1</sub>/FVC ratio, and Dco are above the lower limit of normal according to Tables 5-2b through 5-7b at pages 95 to 100, then a claimant has a Class 1 impairment which is equivalent to no permanent impairment of the lungs. A claimant has a Class 2 impairment, equaling 10 to 25 percent impairment, if the FVC, FEV<sub>1</sub>, or Dco is above 60 percent of the predicted value and less than the lower limit of normal. A claimant has a Class 3 impairment, equaling 26 to 50 percent impairment, if the FVC is between 51 and 59 percent of the predicted value or the FEV<sub>1</sub> or Dco is between 41 and 59 percent of the predicted value. A claimant has a Class 4 impairment if the FVC is lower than 50 percent of the predicted value, or the FEV<sub>1</sub> or Dco is lower than 40 percent of the predicted value.

In a report dated July 1, 2002, the Office medical adviser determined appellant's lung impairment based on the results of the most recent testing, the March 21, 2002 pulmonary function tests performed for Dr. Mumtaz U. Zaman, appellant's attending internist specializing in pulmonary disease. He determined that appellant had a 38 percent permanent impairment of the lungs (the mean between 26 and 50 percent) based on a post bronchodilator<sup>4</sup> FVC of 2.30 liters or 71 percent of the predicted value, an FEV<sub>1</sub> of 2.04 liters or 82 percent of the predicted value, an FEV<sub>1</sub>/FVC ratio of 89 percent which is normal, and a Dco of 10.26 or 45 percent of the predicted value. The medical adviser indicated that appellant's FVC and FEV<sub>1</sub> were Class 2 impairments according to Table 5-12 and the Dco test result equaled a Class 3 impairment. He indicated that the Dco was the most critical function and applied the Class 3 rating in finding a 38 percent impairment. The Board finds that the Office correctly applied the proper standards to appellant's most recent pulmonary function study in determining that he had a 38 percent permanent impairment of the lungs.

In support of his request for an increase in his schedule award, appellant submitted an August 26, 2002 report from Dr. Robert J. Mezey, an internist specializing in pulmonary diseases, who indicated that pulmonary tests performed on July 30, 2002 revealed an FVC of 66 percent of the predicted value, an FEV<sub>1</sub> of 76 percent of the predicted value, an FEV<sub>1</sub>/FVC ratio of 89 which was normal, and a Dco of 46 percent of the predicted value. However, the FEV<sub>1</sub>/FVC ratio of 89 percent is the same as in the March 21, 2002 pulmonary test results used in the Office's August 23, 2002 decision and the Dco of 46 percent is a slight improvement over the 45 percent in the March 21, 2002 tests. The FVC and FEV<sub>1</sub> of 66 percent and 76 percent, respectively, are lower than the 71 percent and 82 percent results in the March 21, 2002 tests. However, Dr. Mezey did not provide both the pre and post bronchodilator results, only the pre

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<sup>3</sup> A.M.A., *Guides*, 107, Table 5-12.

<sup>4</sup> The A.M.A., *Guides* provides that the test results indicating the best effort, before or after administration of a bronchodilator, are used to determine the FVC and FEV<sub>1</sub> for impairment assessment. A.M.A., *Guides*, 93.

bronchodilator results. As noted above, the A.M.A., *Guides* provides that an impairment rating for FVC or FEV<sub>1</sub> is based on the best effort, whether pre or post bronchodilator. The test results for FVC and FEV<sub>1</sub> provided by Dr. Mezey, 66 percent and 76 percent, equal a Class 2 impairment according to Table 5-12 of the A.M.A., *Guides* which is equivalent to a 10 to 25 percent impairment, lower than the 38 percent granted to appellant in the Office's August 23, 2002 decision. There is no medical evidence establishing that appellant has more than a 38 percent permanent impairment of the lungs for which he received a schedule award.

The decisions of the Office of Workers' Compensation Programs dated February 24, 2003 and August 23, 2002 are affirmed.

Dated, Washington, DC  
October 14, 2003

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member